No. 2748

In the United States Circuit Court of Appeals for the Ninth Circuit

COUNTY OF HAWAII,
Plaintiff-in-Error,

vs.

HALAWA PLANTATION, LIMITED, a Corporation,
Defendant-in-Error.

Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR DEFENDANT-IN-ERROR

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This action was originally instituted by the defendant-in-error, the Halawa Plantation, Limited, an Hawaiian corporation, in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii against the County of Hawaii, plaintiff-in-error herein, to recover damages for loss sustained by reason of the burning of a field of sugar cane belonging to the defendant-in-error, the complaint alleging that certain road laborers in the employ of the county while engaged in doing certain work on a county road, negligently set fire to a pile of rubbish on the road in the vicinity of the cane field, which spread to the cane field, thus causing the loss to defendant-in-error.

That the road was a county road under the juris-

diction of the county, that the fire in question was started by road laborers in the employ of the plaintiff-in-error engaged in road work on the road, that the fire so started escaped from the rubbish pile to the premises adjoining the road and thence to the cane field, thus causing the damage and loss set forth in the complaint are facts established by the evidence without any contravening proof. Furthermore, that the laborers were guilty of negligence in the premises is established by the verdict of the jury, and no error is claimed by the plaintiff-in-error herein which in any way affects this finding of the jury.

The jury found a verdict for the defendant-in-error in the sum of $11,727.79, and judgment was rendered thereon and affirmed on Writ of Error by the Supreme Court of the Territory.

On this Writ of Error to the Supreme Court of the Territory of Hawaii, the plaintiff-in-error, the County of Hawaii, contends:

First: That the Supreme Court of the Territory of Hawaii erred in affirming, on Writ of Error, the judgment of the trial Court.

Second: That the Supreme Court of the Territory of Hawaii erred in holding that no error had been committed by the trial Court in overruling the defendant's (plaintiff-in-error herein) demurrer to the complaint.

Third: That the Supreme Court of the Territory of Hawaii erred in holding that no error had been committed by the trial Court in refusing to give de-

fendant's fifth, sixth and seventh requested instructions bearing upon defendant's claim of non-liability on the ground of contributory negligence upon the part of the plaintiff.

The assignments of error, therefore, actually present but two questions for the consideration of this Court, and the plaintiff's-in-error contention in this regard may be summarized as follows:

A. That the County of Hawaii as a matter of law is not subject to civil liability for tort.

B. That error was committed in refusing to instruct the jury on the question of contributory negligence on the part of the plaintiff below, defendant-in-error herein, on the ground that because it appeared from the evidence that an intervening unused strip of land was shown by the evidence to be covered more or less by dry vegetation and rubbish extending from the road where the fire was started to the cane field, the jury should have been permitted to determine whether or not the plaintiff below was guilty of contributory negligence in failing to have cleared the strip in question from the inflammable vegetation and rubbish.

CONTENTION OF DEFENDANT-IN-ERROR.

These assignments of error will be dealt with in the foregoing order, it being the contention of this defendant-in-error, the Halawa Plantation, Limited, that it is a settled rule of law in the Territory of Hawaii that a regularly incorporated county organi-

zation, such as is the County of Hawaii, is liable for the tortious acts of its servants and employees for the same reason and in the same degree that a municipal corporation is liable to respond in damages for similar defaults upon the part of its servants or employees, and further, admitting that there is a conflict in authority as to the liability of counties for tort, and that a certain degree of exemption is accorded to subdivisions of the state, of the kind referred to in the brief of plaintiff-in-error as quasi corporations, this doctrine of exemption from legal liability has no application to a fully incorporated and empowered political subdivision, as is the County of Hawaii.

It is further contended by this defendant-in-error that this Court will attach due and controlling weight to the fact that this question has been settled in a careful and searching opinion of the Supreme Court of Hawaii in an earlier case than the one now at Bar, on a set of facts that permitted a precisely similar application of the principle contended for here, and establishing a rule of law in Hawaii.

It is further contended by this defendant-in-error that no error was committed by the Supreme Court of Hawaii in its finding that the trial Court did not err in refusing to give the instructions on contributory negligence asked for by the plaintiff-in-error, the County of Hawaii, on the general ground that the evidence in the cause did not warrant the trial

Court in giving the jury instructions upon contributory negligence.

ARGUMENT.

THE COUNTY OF HAWAII, BEING INCORPORATED UNDER ACT 39 OF THE SESSION LAWS OF THE TERRITORY OF HAWAII FOR THE YEAR 1905 AND EMPOWERED THEREUNDER TO SUE AND BE SUED IS LIABLE FOR THE ADMITTED NEGLIGENCE OF ITS SERVANTS IN THE CASE AT BAR.

The County of Hawaii, the plaintiff-in-error, was created and organized under Act 39 of the Session Laws of the Territory of Hawaii for the year 1905 entitled "An Act Creating Counties in the Territory of Hawaii and Providing for the Government Thereof," with full powers to sue and be sued, and to appear at Courts of law and equity in all respects as if it were a natural person.

Chapter 4 of Act 39 of the Territorial Session Laws of 1905, by which county government was organized as now existing in the Territory, provides as follows:

"General Powers, Liabilities and Limitations of Counties.

"Section 9. Each County shall have the following powers and be subject to the following liabilities and limitations:

1. To sue and be sued in its corporate name;
2. To purchase and otherwise acquire, take on

lease and hold real and personal property within its defined boundaries and to manage and dispose of the same as the interests of the inhabitants thereof may require;

3. To construct, purchase, take on lease or otherwise acquire buildings for County purposes, sewers, pumping stations, water works, including reservoirs, wells, pipe lines and other conduits for distributing water to the public, lighting plants, apparatus and appliances for lighting streets and public buildings; to acquire and maintain apparatus for extinguishing fires; to open, construct, maintain and close up public streets, highways, roads, alleys, trails and bridges within its boundaries, but no new street, highway, road or bridge shall be constructed without the location, grade and method of and material to be used in the construction of the same shall first be approved by the Superintendent of Public Works;

3a. To collect rates for water supplied by or from such pumping stations and water works; and for the use of sewers;

4. To make contracts and to do all things necessary and proper to carry into execution the foregoing powers and all other powers vested in said County or in any officer thereof;

5. No County shall in any manner give or loan its credit to or in aid of any person or corporation and any indebtedness or liability incurred contrary to this provision shall be void;

6. No contract involving an expenditure of public funds amounting to Five Hundred Dollars or more shall be awarded except to the lowest bidder after public advertisement for tenders, and no public work or requisition for material therefor shall be divided or parceled out for the purpose of evading the provisions of this Section and no new work involving the expenditure of Five Hundred (500) Dollars or more shall be done except by contract as above set forth; but the provision of this Section shall not be applicable to road work;

7. All contracts, authorizations, allowances, payments and liabilities entered into, granted, made or incurred in violation of this Act shall be void and shall never be a basis of a claim against the County;

8. Each of said Counties shall, for the purposes and objects of this Act, be a body corporate and politic and as such shall have all the powers and authority by this Act prescribed, the same to be vested in and be exercised by a Board of Supervisors of the County, as hereinafter provided. The duration and succession of such Counties shall be in perpetuity or until otherwise provided by law."

These provisions of the law, it is submitted, indicate that it was the intention of the Legislature to endow the County of Hawaii with full corporate power and responsibility. And a reading of the relevant parts of the Act as above set forth show that this intention of the Legislature was expressly carried out.

The liability of the County of Hawaii for injuries caused by the tort of a servant in its employ was before the Supreme Court of the Territory in the case of *Matsumura vs. the County of Hawaii*, reported in Volume 19 of the Hawaiian Reports at page 18 and reaffirmed in the same case in a later decision reported in the same Volume at page 496.

After an exhaustive and searching consideration of the authorities, from the leading case of *Russell vs. The Men of Devon,* 2 Term. Rep. 667, to the later decisions, the Supreme Court reached the conclusion that an incorporated county with the express powers possessed by the County of Hawaii is to be held liable

for the tort of its servant and gave judgment accordingly.

The attention of this Court is particularly directed to the careful analysis of the cases by Mr. Justice Ballou and his pointing out the erroneous application of fundamental principles that accompanied a misinterpretation of the real purport of the decision in *Russell vs. The Men of Devon.* This misapprehension is well illustrated by the citation in the brief of plaintiff-in-error, at pages 14-15 thereof, of an extract from Addison on Torts, reading as follows:

"A plainly marked distinction is made and should be observed between municipal corporations, as in incorporated villages, towns and cities, and those other organizations, such as townships, counties, school districts and the like, which are established without any express charter or act of incorporation, and clothed with but limited powers. These latter political subdivisions are called quasi corporations and the general rule of law is now well settled that no action at law can be maintained against a corporation of this class by a private person, for their neglect of public duty unless such neglect of action is expressly given by statute."

Counsel for plaintiff-in-error states that the foregoing extract clearly points out the distinction, i. e., the exemption of a county from legal liability when a municipal corporation would be held to respond in damages for a similar tortious act of a servant. But it is clear that this selection from the text writer is not a happy one so far as supporting any contention of the plaintiff-in-error is concerned. The text

writer states that the distinction is between municipal corporations "and those other organizations, such as townships, counties, school districts and the like, *which are established without any express charter or act of incorporation.* . . . "

It seems unnecessary to observe that the County of Hawaii cannot be included in the author's classification of "quasi corporations," since it has its political existence by virtue of an express act of incorporation, and therefore, under the author's classification, the County of Hawaii is not such a "quasi corporation" as would be exempted from liability to a private person.

The case of *Eastman vs. Clackmas County,* 32 Federal Reporter, 24, points out the error of applying the rule of *Russell vs. The Men of Devon* to county forms of government in the United States. In the course of its decision the Court says:

"In *Russell vs. Devon Co.,* 2 Term. R. 667 (tempus 1788), it was held in the King's Bench that an action would not lie by an individual against the inhabitants of a county, for an injury sustained by reason of a bridge being out of repair, which was chargeable to the county. The decision of the Court was placed by Lord Kenyon on the ground that the inhabitants of a county were not a corporation, and had no corporate fund out of which satisfaction of a judgment could be made; that if the action was allowed, and the plaintiff had judgment, it might be satisfied out of the property of one of the men of Devon, and the result would be 'an infinity of actions' among the defendants for contribution. It had no board or court which stood for the inhabitants and adminis-

tered their local affairs. It had no power of taxation, and therefore had no corporate fund. It was merely a convenient division of the kingdom, comprising a number of quasi corporations, such as parishes, hundreds, or wapentakes, for judicial and representative purposes, in which the king, in his executive character, was represented by the vicecomes, or sheriff, on whom, in process of time, the civil administration was almost wholly devolved." 1 Bl. Comm., 116, 339; Whart. Law Dict. "County."

"The duty of keeping the highways, including the bridges thereon, in repair, devolved on the parishes in which they were. It was accomplished by means of a tax on the property and persons of the parish, paid either in labor or money, and applied under the direction of the surveyor of the ways. By the act of 22 Hen. VIII C. 5, this burden, in the case of bridges outside of any town, was devolved on the county at large; the justices of the county, or any three of them, being authorized to cause the repairs to be made at the expense of the inhabitants thereof; and this undoubtedly was the condition of the bridge in *Russell vs. Devon Co.* The inhabitants of the county had no authority to repair the bridge, or to raise means to do it with, any more than the inhabitants of one of our ward districts. They were only bound to contribute labor or money for that purpose, as they were required by the justices." 1 Bl. Comm., 357; Shear & R. Neg. Sec. 248.

"Following the case of *Russell vs. Devon Co.,* or the provisions of their own statutes, most of the American Courts have held that a county is not liable in damages for an injury sustained by anyone in consequence of failing to keep in repair a highway or bridge, while they have been generally agreed that a town incorporated under a special statute or charter, with authority over the streets and bridges within its limits, and the power to raise money by taxation for that purpose is so liable, unless otherwise

provided by statute." Dill. Mun. Corp. (2nd Ed.) Sec. 785; *Rankin vs. Buckman,* 9 Or. 253.

"The reason given for this distinction—that the inhabitants of a town incorporated under a special statute consent thereto, while a county exists, without the consent of its inhabitants, simply as a subdivision of the state—shows that it is a distinction without any substantial difference. . . . "

"In Iowa, Maryland, Indiana and Pennsylvania, the counties or townships charged with the duty of maintaining highways, and provided with the means of doing so, are held liable for injuries resulting from neglect in this respect." *Brown vs. Jefferson Co.,* 16 Iowa, 339; *Baltimore Co. vs. Baxter,* 44 Md. 1; *House vs. Commissioners,* 60 Ind. 580; *Dean vs. Township,* 5 Watts & S. 545; *Makanoy vs. Scholly,* 84 Pa. St. 136.

"And the modern English local boards and trustees, that are charged with the care and maintenance of highways and provided with the means of raising funds for the purpose, are now held liable, in their corporate capacity, for an injury caused by their negligence or that of their servants." *Trustees vs. Gibbs,* L. R. 1 H. L. 93.

After showing that the county had direct control over the wards through the instrumentality of the county Court; that it could assess and collect taxes for ward purposes through its agent, the ward supervisor, and had express authority for the erection and repair of bridges, the Court concludes:

"Upon this state of the obligation and power of the county, it is liable, in my judgment, for an injury sustained by anyone in consequence of its failure to keep a highway or bridge in reasonable repair; and, on principle, the common law will furnish

a remedy therefor as in the case of an incorporated town."

In other words, the Federal Court held that the nature of the county organization was the proper basis for determining its liability under the rule laid down in *Russell vs. Devon* and that it was clearly unsound to disregard the actual nature of the political subdivision and grant it an exemption from proper legal liability simply because of its being designated a "county," although possessing many of the powers and centralized responsibility of a municipal corporation.

This actual recognition of the true status of the plaintiff-in-error and its consequential liability for the tortious act of its servant is, of course, the underlying basis for the decision of the Supreme Court of Hawaii in the Matsumura case, cited supra, the precedent of which the Supreme Court of Hawaii applied in holding that the rule of liability of a Territorial county was established under the circumstances involved in the case at Bar.

This holding of the highest Court of Hawaii on two separate occasions, which established the law in the Territory, and which, it is submitted should be accorded controlling weight by this Court, is supported in a well reasoned consideration of the question in Thompson on Negligence, at page 618, where the author says:

"Where, therefore, counties are erected into corporations, provided with a corporate fund, or the

power of raising it, and invested with the care of highways and bridges, the reason of the rule ceases, and the rule ought to fall with it; they should stand upon the same footing in this regard as chartered cities. Notwithstanding the doctrine of *Reardon vs. St. Louis County,* the Supreme Court of Missouri lately held that a county was liable in a civil action for the negligence of a contractor, over whose work it reserved superintendence and control, with power to discharge his employees, in digging a ditch in such a careless manner that one of the employees of such contractor was killed in it. The case proceeds upon the idea that the rule that counties being political subdivisions of the state, are not liable for the laches or misconduct of their servants, has no application to a neglect of those obligations incurred by counties when special duties are imposed on them with their consent, express or implied, or when a special authority is conferred on them at their request. *(Hannon vs. St. Louis County,* 62 Mo. 313.) In this respect it follows the language of Metcalf, J., in *Bigelow vs. Randolph,* (14 Gray, 543,) qualifying *Mower vs. Leicester,* (9 Mass. 247). There is an infirmity in the case, consisting in the fact that the negligence was that of a *contractor,* and the deceased was his *employee."*

"The doctrine of this case, in so far as it makes counties liable for the torts of their employees is a sound one. The ground on which Lord Kenyon placed his judgment in *Russell vs. The Men of Devon* —that counties have no corporate fund, and that judgments for damages against them would hence have to be levied off the property of any one or more of the individual inhabitants—is not sound when applied to counties in Missouri, Illinois and other Western states. These counties are political bodies, having a common administrative board, elected by the votes of the county, by which the business of the county is transacted. Through this board the county contracts and is contracted with, sues and is sued.

Many counties issue negotiable securities in large amounts. Their administrative boards possess a limited power of taxation for county purposes. In these respects no substantial difference is perceived to exist between them and chartered municipal corporations. The argument that liability should attach to the latter, and not to the former, because the latter are supposed to accept their charters voluntarily, while the duties and obligations annexed to the former are imposed on them involuntarily, is based on an assumption, in most cases, and is, even where the premises are correct, fantastical and destitute of sense. There is no sound distinction between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the Legislature, in the due exercise of its powers, has imposed upon it. The reasoning of Lord Kenyon, that to give a private action against a county for damages sustained by reason of a failure to repair its highways would lead to a multiplicity of suits to enforce contribution from other inhabitants, has no application to our system. Such a judgment would, with us, be enforced by mandamus against the County Court, or other administrative board of the county, compelling them to levy a tax to pay it."

This reasoning, it is submitted, applies with decisive force in sustaining the liability of the County of Hawaii in the case at Bar. The quoted provisions of Act 39 of the Territorial Session Laws for 1905 show that the nature of the full corporate organization of the County of Hawaii bring it, not only within the reasoning of Thompson in his consideration of the county organizations of the Western states, but in fact show the plaintiff-in-error to possess even a greater degree of centralized power and responsibility than is usually vested in the counties which the

author had in mind in the course of his careful analysis.

It should be noted that under the provisions of Section 9 of Act 39 of the Session Laws of 1905 the plaintiff-in-error is granted the power of maintaining highways, yet the duty of highway administration is not specifically enjoined and it follows therefore, that no action would lie for non-feasance in failing to take affirmative action under the grant of power given to the County of Hawaii by Section 9. And it is equally clear that in the case of a municipality undertaking a work not specifically enjoined and which it is not required to perform by virtue of its organization, and in the performance thereof an individual suffers damage by reason of the work being done negligently, that the individual may have an action against the municipality.

5 Thompson, Negligence, Sec. 5788.

This proposition of law is firmly established and applies directly to the facts and circumstances involved in the case at Bar. No mandatory duty was imposed upon the County of Hawaii to undertake the work, the conceded negligence in the performance of which resulted in the damage to defendant's-in-error property. It was work left entirely to the discretion and control of the agents and servants of the County of Hawaii and therefore the rule of liability is properly applicable, in conjunction with the rule of local law, supported by authority, that a county organization of the type of the County of Hawaii is liable for

the negligent acts of a servant, illustrated by the facts of the case at Bar.

In the brief of plaintiff-in-error an attempt is made to distinguish the rule of local law, established in *Matsumura vs. County of Hawaii,* supra, and deny its application herein. It is submitted that the Matsumura case is precisely in point, as was held by the Supreme Court of Hawaii, and that the effort of plaintiff-in-error to escape the conclusive effect of the reasoning of that decision in the case at Bar is entirely unavailing.

In the Matsumura case the Supreme Court of Hawaii found that it was "not a case of negligent failure to repair a public work but lack of due care in the execution of the work ordered by the corporation. 2 Cooley Torts. 3rd ed. 741."

This language, it is submitted, is clearly applicable to the facts of the case at Bar, and no reasonable distinction is possible to support the contention of the plaintiff-in-error.

The decision in the Matsumura case continues, at page 22 of Volume 19 of the Hawaii Reports:

"It is not the act of an elective or public officer of whom the relation of master and servant may be doubtful but of a servant selected by the supervisors themselves. 5 Thompson, Negligence, Sec. 5792. It is not the act of the county in planning a public work (*Johnson v. District of Columbia,* 118 U. S. 19), but in the ministerial function of carrying out that plan. 5 Thompson, Negligence, Sec. 5794. The only possible exemption applicable seems to be that taken in those cases which draw a distinction between the gov-

ernmental and corporate functions of a municipality *(Moffitt v. Asheville,* 103 N. C. 237). The typical case is that of nonfeasance in the face of a duty imposed upon the corporation, and it is upon this class of cases, which includes actions for injuries resulting from the negligent failure to repair highways, that there is the greatest conflict of authority. The leading cases denying liability upon this are *Hill v. Boston,* 122 Mass. 344, and *Detroit v. Blackeby,* 21 Mich. 84. Opposed to these are the cases represented by *Barnes v. District of Columbia,* 91 U. S. 540, repeatedly followed *(District of Columbia v. Woodbury,* 136 U. S. 450) and cited with approval even when subsequent decisions have been controlled by local or admiralty law. *Detroit v. Osborne,* 135 U. S. 492; *Workman v. New York City,* 179 U. S. 552, 574.

"We need not enter into a discussion of these authorities, however, nor even into those holding that the repair of highways is properly classed as a corporate and not a governmental function *(Coburn v. San Mateo County,* 75 Fed. 520; *Barree v. City of Cape Girardeau,* 197 Mo. 382; 95 S. W. 330), because we are of the opinion that under no proper conception of the doctrine of municipal immunity in the performance of governmental functions can it be held to include immunity for negligence resulting in the direct invasion of plaintiff's private right as an adjacent land owner.

"Before examining the authorities we may restate the question from a different point of view. It will be observed that the injury in any case may result from nonfeasance or misfeasance and that the latter class may be again divided so that we find injuries resulting from (1) nonfeasance, (2) the negligent performance of the act, (3) the necessary consequence of the act and (4) intentional trespass. Each of these four may in turn result in the invasion of (a) public or (b) private rights. When we take into consideration the fact that almost every case of negligence may be viewed indifferently either as omission

or as commission (1 Street, Foundations Legal Liability, 86), it is not strange that there is confusion in the application of the theory of governmental immunity among these classes of cases."

The Court then states that:

" . . . the case at Bar is concerned only with the invasion of a private right through misfeasance of the defendant's agent either as a necessary result of his wrongful act or because of the negligent manner in which it was done. Upon either theory a municipal corporation would be liable."

It seems unnecessary to show the application of this language to the case at Bar. The private right of the defendant-in-error was invaded through the fire that communicated to its cane field as the result of the negligent act of the servant of plaintiff-in-error.

As is said in the case of *Hill vs. Boston,* 122 Mass.:

"In such cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it was intended, but is the doing of a wrongful act, causing a direct injury to the property of another, outside the limits of public works."

In considering the doctrine of exemption as applied to governmental work Chief Justice Shaw said:

"But this presupposes that the public work thus authorized will be executed in a reasonably proper and skilful manner, with a just regard to the rights of private owners of estate. If done otherwise, the damage is not necessarily incident to the accomplishment of the public object, but to the improper and

unskilful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable by it. It is unlawful, and a wrong, for the redress of which an action of tort will lie." *Perry vs. City of Worcester,* 6 Gray 544.

The reason for holding a municipal corporation liable for private injuries sustained in the execution of public work is set forth in *Eastman vs. Meredith,* 36 N. H. The Court says:

"The plaintiff, in cases of this character, does not recover on the ground that he has been denied any public right which the corporation owed to him as a citizen of the town, or because he has suffered an injury in the exercise of a public right, from neglect of the town to perform a public duty. The corporation being authorized by law to execute the work, if, in their manner of doing it, they cause a private injury, they are answerable in the same way and on the same principle as an individual who injures another by the wrongful manner in which he performs an act lawful in itself. It has been sometimes made a question, whether in the particular case the corporation were liable as principals for the conduct of those who performed the work on their account; but where a work is once conceded to be done by the corporation, it would seem to be clear, on authority and general principles, that a corporation, public or private, must be held liable like an individual for injuries caused by negligence in the process of executing the work." *Eastman vs. Meredith,* 36 N. H. 284, 295.

It is submitted that it is clear that a municipal corporation would be undeniably liable in tort under circumstances similar to those present in the case at

Bar, and that the County of Hawaii, expressly created a corporation empowered to sue and be sued, cannot escape liability on an assumption, which, in the language of Thompson is "in most cases, even where the premises are correct, fantastical and destitute of sense."

THE LIABILITY OF THE COUNTY IN CASES SIMILAR TO THE ONE AT BAR, BEING AN ESTABLISHED RULE OF LOCAL LAW IN HAWAII, THIS COURT WILL NOT SET THE RULE ASIDE.

It is submitted that the rule of local law, holding the County of Hawaii to a legal liability, and regarded as a precedent binding on the Supreme Court of Hawaii in that Court's decision in the case at Bar, should be accorded controlling weight by this Court and, therefore, the judgment of the Supreme Court of Hawaii should be affirmed.

The authorities are numerous that the character and extent of the powers and liabilities of the political bodies or municipal corporations of a state are in general questions of local law, as to which the decisions of the highest Courts of the jurisdiction are authoritative in the Federal Courts.

Johnson vs. St. Louis, 96 C. C. A. 617, 172 Fed. 31.

Goodrich vs. Chicago, 4 Biss., 18 Fed. Cas. No. 5, 542.

So, it has been held that state decisions will be followed as to the authority of a public board and as to the contracts of counties or school districts.

Hoyt vs. Gleason, 65 Fed. 685.

Thompson vs. Searcy County, 6 C. C. A. 674, 57 Fed. 1030.

The questions of municipal liability for defects or obstructions in the street and liability for the torts of officers or employees, though not involving a statute, and turning upon the distinction between governmental and private functions, have been regarded as local questions, as to which the decisions of the Courts of the local jurisdiction are controlling. And this, of course, is true, a fortiori, if the decisions of the state Court rest upon a statute.

Detroit vs. Osborne, 34 Fed. 260, 10 Sup. Ct. Rep. 1012.

Blaylock vs. Muskogee, 54 C. C. A. 639, 117 Fed. 125.

Denver vs. Porter, 61 C. C. A. 168, 126 Fed. 288.

Merrill vs. Portland, 4 Cliff, 138, Fed. Cas. No. 9470.

THERE WAS NO EVIDENCE TENDING TO SHOW CONTRIBUTORY NEGLIGENCE AND THEREFORE IT WAS NOT ERROR FOR THE TRIAL COURT TO REFUSE TO INSTRUCT THE JURY THEREON.

It appeared incidentally in various parts of the

testimony in the trial Court, that there was a rather steep pali of a width of about two hundred and fifty feet between the road and the cane field, covered with lauhala trees, the leaves of which were more or less dry, dry leaves on the ground, and dry grass and weeds, and that the weather had been dry for two or three months.

In view of this testimony, the plaintiff-in-error contends that the trial Court should have left it to the jury to determine whether or not the defendant-in-error was negligent in failing to have cleared the dry vegetation, rubbish, and leaves away, so that the fire in question could not have reached the cane field. There being no other evidence whatever in the record upon which a contention of contributory negligence could be based, the trial Court refused to give any instruction upon contributory negligence.

This contention upon the part of the plaintiff-in-error is clearly unsound on either of two grounds.

In the first place, the combustible material in question had not been placed upon the premises by the defendant-in-error, but was natural vegetation that had grown thereon. Furthermore, the defendant-in-error did not become cognizant of the fire negligently started by the county employees, until it was too late to remove or attempt to remove this combustible material, and therefore could not be charged with the affirmative duty of doing what it could to avert a known and impending danger.

In the second place, even if the defendant-in-error

could be said to have been guilty of negligence in failing to clear the strip in question of combustible material in anticipation of fire such as the one in question, the rule known as the "last clear chance rule," which has been fully recognized and established by the United States Supreme Court, would eliminate any question of contributory negligence in this case.

We shall deal with these two points separately.

NO NEGLIGENCE SHOWN.

It is to be borne clearly in mind that the strip of land in question which lay between the road and the cane field, was an uncultivated strip of land in its natural state, and that the combustible material which the county claims should have been removed in anticipation of fires, consisted of natural growths of vegetation, such as grass and weeds, and the bushes and trees and leaves therefrom and thereon. In the second place, there was no extremely hazardous, or even hazardous, use being made of any of the premises adjoining or in the vicinity of the strip in question, from which fires should have been apprehended, such as a railway.

Under these circumstances, we submit that no case can be found in the books, which can be regarded as an authority for the contention that any duty was placed upon the defendant-in-error to take any precaution against fire by removing the combustible material in whole or in part.

In the case of *Erd vs. C. & N. W. R. Co.,* 41 Wis. 65 at 66, the Wisconsin Supreme Court expressly declares as follows:

"The fact that there was combustible material on the plaintiff's land adjoining the tract, did not constitute negligence on his part."

See also the following cases which amply bear out our contention:

Box vs. Kelso, 5 Wash., 360, at 364-365;

Tacoma, etc., Co. vs. Tacoma, 1 Wash. 12;

Fraler vs. Seers Union Water Co., 12 Cal., 556 at 559;

Alfern vs. Churchill, 53 Mich., 607, 19 N. W. 549;

Cook vs. Champlain, etc., Co., 1 Denio (N. Y.), 91 at 99-100;

Yik Hon vs. Spring Valley Water Works, 65 Cal. 619, 4 Pac. 666.

In the case last cited at page 620 of the state report, the Court says:

"The right of a man to make free use of his property is not to be curtailed by the fear that his neighbor will make a negligent use of his."

We do not dispute the rule of law that once a force is set in motion, even though due to the negligence of another, which becomes known to the party complaining before the injury to him is done and which he as a reasonable man should have known was threatening his property, the duty is cast upon him to take all reasonable means, even though involving affirmative action on his part, to avert the threatened

injury, and if he fails to take such action, he is guilty of contributory negligence and cannot recover from the person who negligently set the force in action. *But* that rule of law has no application to the case at Bar. The testimony, without contradiction, shows that after the fire was started by the county employees, nothing was left undone by the defendant-in-error to save the field of cane or to lessen the injury thereto.

On the other hand, the rule of law cannot be questioned, that with regard to possible dangers resulting from the negligence of others, but which have not to the knowledge of the party injured actually been brought into action, no duty is cast upon the party injured to guard against or avert the same. This rule is especially emphasized when applied to the use made of one's own property.

In the railway cases the Courts have recognized that an operating railway is constantly an actually existing source of danger from fire, because it is well known that railroad engines may be expected to emit sparks at any time. Therefore in such a case, it is as if a fire were already started moving in the direction of the property of the injured party. However, even in the case of a railway, thus constituting an actually existing and constantly threatening danger to adjoining property, no Court has held that the owner of the adjoining property is obliged to anticipate fire and to avoid its consequences, keep his land cleared of natural vegetation.

In the case at bar, the intervening strip of land was in a state of nature. There was no hazardous enterprise being carried on in its proximity. The owner thereof had the right to assume that the county employees working on the roads would exercise care in doing their work, and could not be called upon to anticipate that they would negligently start a fire within a few feet of the premises, with the wind blowing in that direction. It had the right to assume that rubbish on the roads would be disposed of by the county in a lawful, prudent and careful manner, in which case the damage complained of would not have occurred.

To hold otherwise, this Court would virtually declare that every owner of land wherever adjoining a public road, highway or byway, is in duty bound to keep the same clear of any vegetation whatever that is capable of conveying fire on account of its combustibility. Further than that, no crop, whether sugar cane or any other crop capable of ignition, could be grown next to a highway without casting upon the owner the charge of contributory negligence.

In the case of *Cook vs. Champlain Transportation Company,* 1 Denio 90, the Court indicated the inherent limitations as to applying the doctrine of contributory negligence:

"Another ground for non-suit was urged; the injury done was said to be in part at least attributable to the negligence of the plaintiffs themselves, in voluntarily placing their property in an exposed

position, and therefore the law would afford no redress. On the argument at bar, this was strenuously insisted as fatal obstacle to any recovery.

"The general principle is certainly well established, that if the plaintiffs' wrongful act or negligence concurs with that of the defendant in producing the injury, the law will not aid him in obtaining redress. This principle has a broad and extended application, but nevertheless admits of exceptions and qualifications. It is unnecessary, however, to state the exceptions for the general principle does not, as I think, reach this case. *The property destroyed was in an exposed and hazardous position, and therefore in more than ordinary danger from mere accidental fires. This risk the plaintiffs assumed,* BUT NOT THE RISK OF ANOTHER'S NEGLIGENCE. They were on their own land, and free to use it in any manner and for any purpose which was lawful. As was correctly observed by the circuit judge, 'the plaintiffs had as good a right to erect their mill on the shore of the lake as the defendant has to sail on its bosom.' It would be a startling principle indeed, that a building placed in an exposed position, on one's land, is beyond the protection of the law; and yet it comes to this result upon the argument of this case. A landowner builds immediately on the line of a railroad, as he has an unquestionable right to do; *it may be an act of great imprudence, but in no sense is it illegal. Is he remediless if his house is set on fire by the sheer negligence of an engineer in conducting his engine over the railway?* There must be some wrongful act or culpable negligence on the part of the plaintiffs to bar them on this principle; and neither can be affirmed of any one for simply occupying a position of more or less exposure on his own premises."

Applied to the facts of the case at bar, the foregoing statement of the law clearly forecloses the con-

tention that there was any contributory negligence on the part of the plaintiff below.

The plaintiff-in-error cites the case of *Keese vs. C. N. & W. R. Co.,* 30 Iowa 78. This case, we submit, can be supported on one ground only, a ground which distinguishes the case from the case at bar, namely, that the existence of the defendant's railway and its use of the same with locomotives constituted an ever existent source of danger from fire, in other words that a railway in operation is a "seen" danger, just as much as if a fire were already started traveling in the direction of the plaintiff's property to his knowledge, and therefore the affirmative duty is cast upon the plaintiff to exercise reasonable care to protect his property being threatened. This element is recognized in the Wisconsin case of *Murphy vs. N. C. & W. R. Co.,* 45 Wis. 222, where the Court says:

"We see no reason why a man who recklessly and unnecessarily exposes his property to destruction by fire in the immediate vicinity of a railroad, *which from the necessity of the case must use the dangerous element of fire in carrying on its business,* should as a general rule be protected, if by the use of ordinary care he could have avoided its destruction. . . . "

In other words, cases of fires communicated from railway locomotives, and transmitted to the property destroyed by means of dry rubbish and vegetation on the plaintiff's land are classified with cases such as *Brown vs. Brooks,* 85 Wis. 290. The plaintiff in *Brown vs. Brooks* knew that the fire which eventually destroyed its property was raging and approaching

his property twenty-four hours before the damage was done. In the face of this known or "seen" danger, he failed to take any steps to protect his property therefrom. Of course, this failure constituted a fact which should have gone to the jury as tending to show contributory negligence. Likewise the hazardous character of a railway used by locomotives may very well be regarded as a "seen" danger or known danger.

However the case at bar is absolutely dissimilar. People are not constantly building bonfires on the public highways. By no stretch of a reasonable imagination, can the possibility of such fires being built be regarded as a "seen" danger. In other words there was nothing which should have warned the plaintiff below that such a fire would probably be built in the vicinity of its cane field. The evidence shows without contradiction that it did not in fact become cognizant of the fire until it had gone entirely beyond control.

We submit that there is not one particle of evidence in the record tending even to show that the plaintiff failed in anything in attempting to discover that the rubbish pile on the highway in question was to be fired or that there was such a fire after its ignition until it had gotten absolutely beyond control.

The only evidence being that the strip of land in question was left in its natural state, even though the natural vegetation thereon on account of its dry condition was combustible and capable of conveying

fire, and there being nothing in the nature of a hazardous use of enterprise carried on in its vicinity which caused the fire, there was nothing whatever even tending to show contributory negligence, and consequently the trial Court was justified in refusing to instruct the jury on that subject; and had it done so, would have been in error on account of the utter absence of evidence of contributory negligence.

LAST CLEAR CHANCE RULE.

While we submit that it is clear that there was no evidence whatever tending to show contributory negligence on the part of the defendant-in-error, and are satisfied that this Court will not deem it necessary to consider the rule of law about to be discussed, yet the case at bar comes so clearly within the so-called "last clear chance rule" even if there was any contributory negligence, that this Court would be obliged to sustain the judgment below under that rule, and we therefore proceed to show its applicability here.

A leading case on this subject is the case of *Davies vs. Mann,* 10 M. & W. 546, which is mentioned in the brief for the plaintiff-in-error.

The facts were that the plaintiff had negligently left his donkey tethered on the highway. The defendant in driving on the highway negligently ran over the donkey, causing the damage on account of which the plaintiff brought the suit.

The Court held that notwithstanding the negligence of the plaintiff, the defendant was liable.

This case has been the subject of considerable conflicting discussion, but we submit that it is clear that the difference of opinion regarding the case arises out of an element of uncertainty in the statement of the facts of the case, namely, the question whether or not the defendant actually became aware of the presence of the donkey in the road in time to avoid the collision, whereas in the case at bar there is no analogous uncertainty. Thompson on Negligence, Sec. 231, makes clear the uncertainty regarding the facts of the *Davies vs. Mann* case, and without qualification indorses the soundness of its decision *provided* the defendant became aware of the helpless condition of the donkey in sufficient time to avoid running over it.

In other words even though the plaintiff in tethering the donkey in the highway was guilty of negligence, the defendant's negligence at the later moment was sufficient to make him liable notwithstanding the plaintiff's negligence if as a matter of fact the defendant observed the condition of the plaintiff's donkey in such time that he could have, by the exercise of care, avoided the collision. Granting the existence of the last mentioned element, to-wit, the knowledge of the defendant of the condition of the plaintiff's property in time to avoid the injury, the defendant being absent and therefore unable to act in any attempt to avoid the injury when the plaintiff's negligence arose, there is no quarrel in any of the decided cases with the decision in *Davies vs.*

Mann. And, as the above mentioned quotation from Thompson on Negligence shows, that author agrees with the decision if the element in question existed.

The rule laid down in *Davies vs. Mann,* when explained as explained by Thompson, is clearly adopted by the United States Supreme Court.

Inland, etc., Co. vs. Tolson, 139 U. S. 551;

Grand Trunk Ry. Co., Ives, 144 U. S. 408 at 429.

The application of the rule to the case at Bar is clear. One Koolau was the small overseer, under Naipo, the district road supervisor, and in charge of the particular work of clearing the rubbish from the road and disposing of the same. (Tr., p. 49.) Koolau had been directed by the road supervisor, Naipo, to clear up the rubbish in question and he himself lighted the fire to the rubbish pile. (Tr., p. 52.) Koolau knew that the weather had been dry in the vicinity in question for a considerable time and that the vegetation on the strip of land between the road and the cane field was more or less dry. Not only this, but Koolau, before starting the fire to the rubbish pile, had thought of the possibility of the grass and rubbish on the hillside catching fire (Tr., p. 54) as well as the possibility of the cane field in question catching fire should the fire extend to the dry vegetation on the intervening strip of land (Tr. p. 74). Unfortunately for the county as well as the defendant in error, although Koolau realized the danger and knew the existing conditions, including a breeze blowing in the direction of the intervening

strip of the land and the cane field, he did not, according to the verdict of the jury, exercise sufficient care to prevent the happening of the disaster, the possibility of which he had affirmatively in mind.

On the other hand, according to all of the testimony, the defendant-in-error had no one in the vicinity at the time, and consequently it could take no steps to avert the injury, once the fire was started.

We have, therefore, an exact case for the application of the "last clear chance rule."

Even if the failure of the defendant-in-error to remove the dry vegetation between the cane field and the road constituted negligence on its part (which we, of course, dispute), the county, through its employees, being at the time actually aware of the dry condition of the vegetation adjoining the road as well as the existence of the cane field, and also of the breeze blowing in the direction of the cane field, at a time when there was no one in the vicinity representing the defendant-in-error to protect its property or avert the fire once it was started, started a fire in a negligent manner which caused the injury. In other words the active negligence of the county arose at a time when the negligence, if any, of the defendant-in-error was passive, at a time when the county was aware of the existing conditions on the property of the defendant-in-error and when the defendant-in-error was absent and in no position to avert the danger once the fire was started.

The case is perfectly simple. At the time the coun-

ty began the negligent operation and until the fire had gone beyond control, the defendant-in-error irrespective of any preceding lack of precaution, was absolutely helpless because it was not on the ground. The county, through its employees, found a known condition existing, that is to say, known to it, and nevertheless acted so negligently with respect to that condition, that the damage to the defendant-in-error resulted when it was powerless to do anything to avert the same.

In conclusion, it is submitted that it is clearly established that a municipal corporation would be held to a legal liability under the facts and circumstances existing in the case at Bar. The fact of negligence upon the part of plaintiff's-in-error servant, resulting directly in loss to defendant-in-error as an adjoining land owner, cannot be questioned. At the time that the negligent act was committed, the employees of the County of Hawaii were engaged in the performance of work not specifically enjoined upon the county, the assumption of highway control and development being a matter within the discretion of the constituted authorities of the county.

It has been shown that it is an established rule of local law in the Territory of Hawaii that the County of Hawaii is liable to respond in damages for injury caused to an individual occasioned by the negligent act of a county servant, and the nature of the powers and liabilities given to and imposed upon the county, together with the express provision that it may sue

and be sued, forbids its inclusion within any artificial classification for the purpose of construing therefrom an implied exemption from liability in the case at Bar, and this firmly established rule of local law should be given due and controlling weight by this Court.

That the doctrine of contributory negligence cannot be summoned to the aid of plaintiff-in-error has also been shown and, if the facts of the case did permit its application, plaintiff-in-error would nevertheless be precluded by the last clear chance rule.

We submit that the judgment of the Supreme Court of the Territory of Hawaii should be affirmed.

Respectfully submitted,

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Dated May 6, 1916.

ADDENDUM: As pointed out by the Supreme Court of the Territory the Legislature has met in four regular sessions since the decision in the Matsumura case and has not amended the County Act to meet that decision (Record, p. 304). It has, however, amended the Act in numerous other respects (See, for instance Revised Laws of Hawaii 1915, Sections 1503, 1507-1517, 1519, 1527, 1531, 1554, 1565-1567, 1573). Under the circumstances the decision must be held to have received legislative sanction and is now clearly controlling, whether erroneous in principle or not.

26 Encyc. Law 167 and cases cited,
36 Cyc. 1143-4 and cases cited.